UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01

NEW ENGLAND REGIONAL COUNCIL OF CARPENTERS, LOCAL 33	)	
and	)	
NEW ENGLAND FINISH SYSTEMS, LLC	)	Case No. 01-CD-183789
and	)	
INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 35	)	
NEW ENGLAND REGIONAL COUNCIL OF CARPENTERS, LOCAL 33	)	
and	)	
COLONIAL SYSTEMS, INC.	)	Case No. 01-CD-183838
and	)	
INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 35	)	

NEW ENGLAND REGIONAL COUNCIL OF CARPENTERS, LOCAL 33'S POST HEARING BRIEF

I. BACKGOUND AND FACTUAL BACKGROUND

Colonial Systems, Inc. ("Colonial") is a construction company working in the Greater Boston area in what is known as the "furniture" industry. Tr. 37, 140. Furniture companies install demountable partition systems, which include floor to ceiling systems and floor to some specified below ceiling height, as well as office cubicles, attached desks, work stations and cabinets and stand-alone office furniture. Tr. 37, 50-57, 122, 147, 416, 456. Demountable partitions are designed and marketed to be taken down, so the office space can be reconfigured

when the owner chooses to do so, with limited damage to the office space. Tr. 40, 136-37, 195, 223, 264, 1054-55, 1071, 1080-81, 1085; EX 6 ("If it ever becomes necessary to move or reconfigure our (Infinium) unitized wall system, the prefabricated framed panels make it a breeze"); PX 26 ("innovative moveable wall solutions...Genius walls provide years of use, even through multiple configurations."); PX 27 ("Environamics movable walls"); PX 30, p. 17 (Steelcase "provides a platform for the future...it's easy to make small changes or large changes...."). Matt McKenna, Colonial's Vice President of Operations, testified that a "demountable partition is a floor to ceiling partition that's meant to be able to reconfigured."

The owner of office space contracts directly with its selected manufacturer/supplier to purchase and install a "furniture" system, and then the manufacturer/supplier contracts with Colonial, or another furniture company, for the installation of the product. Tr. 37, 78, 172, 177, 227, 231. The "furniture" work is separate and distinct from, and comes after, the construction work performed by the general contractor and its subcontractors who build the actual office space. Tr. 536.[1]

Starting in the early to mid-2000s, architects began to change their design from cubicles, solid walls and demountable office systems with fabric, plastic and other solid materials to demountable glass partitions systems where the systems can easily be disassembled and reconfigured, with minimal damage to the office. Tr. 60, 287, 418-19, 538. About ten years ago, the manufacturers/ suppliers with whom Colonial had done business for decades added

[1] There is a significant tax advantage to the owner when the product qualifies as "furniture" as it is then classified as personal property under the Internal Revenue Code and depreciated over seven years as opposed to the standard thirty nine year depreciation schedule for real property. The determination that a product is personal property is not based on whether it is called "furniture" or "demountable" as the Glaziers imply, but rather is determined by how the product is designed and its intended use. Tr. 62, 140. Rev. Rul. 75-178, 1975-1 CB, 9 (the personal property depreciation is dependent on "how permanently the property is designed to remain in place"); see also IRS Cost Segregation Audit Techniques Guide, Ch. 2 Tests for Distinguishing §1245 and §1250 Property, www.irs.gov/businesses/cost-segregation-audit-techniques-guide-table-of-contents.

demountable glass partitions systems to their product lines, and Colonial made that same switch to its installation line of business. Tr. 77, 149, 418-19.

Colonial is, and at all relevant times has been, a member of the Building Trades Employers Association ("BTEA"), a multi-employer group of Massachusetts subcontractors that is signatory to a collective bargaining agreement with the New England Regional Council of Carpenters, Local 33 ("Carpenters"). Tr. 141, 562-63; JX 1. The current collective bargaining agreement between the BTEA and the Carpenters expires on August 31, 2019. JX 1. Colonial has approximately 60-90 full-time, regular Carpenters-represented employees, with 45-50 of these carpenters having 12-15 years tenure with the company. Tr. 141 These employees perform all of Colonial's demountable partitions installations, eighty percent (80%) of which are glass partitions systems. Tr. 38, 94, 114, 121, 151, 1067. The only exception to this assignment to Carpenters-represented employees is with systems that contain some unframed glass, in which case the handling and installation of the unframed glass only is performed by its Glaziers-represented employees. Tr. 46, 64, 74, 95, 164. [2]

With respect to the Glaziers, Colonial is an independent contractor, and not a member of a multi-employer bargaining group. The Painters and Allied Trades, District Council 35 ("Glaziers" or "DC 35") is signatory to a multi-employer collective bargaining agreement with the Painting and Finishing Employers Association of New England, Inc. Tr. 51; JX 2. Colonial has agreed to be bound to the BTEA agreement through its signing of an independent agreement. PX 21; JX 2. From 2008, when Colonial became signatory with the Glaziers, it has employed Glaziers-represented employees solely for the handling and installing of the raw glass, which

[2] At the hearing this unframed glass was also referred to as "unclad glass" or "raw glass." Tr. 283-84, 376. Where Colonial and NEFS, the Employers involved in the present dispute, refer to the unframed glass as "raw glass," that is the term the Carpenters use in this brief.

represents a very small portion of its glass installation work. Tr. 38, 64, 151. Colonial employs no permanent, full-time Glaziers-represented employees, and when it needs glaziers to handle the raw glass, it calls the Glaziers for short-term referrals. Tr. 65, 141.

In the summer of 2015, Colonial installed demountable partition systems at the following five jobs in the metropolitan Boston area: 1) One Federal Street, 8th Floor, Boston (Steelcase) (PX 30); (2) the Boston Public Library College Planning Center (KI Genius) (PX 26); (3) One Memorial Drive, Cambridge, Microsoft (Modern US) (PX 28); (4) 200 Berkeley Street, Floors 9-12, Boston (Environamics) (PX 27); (5) Partners Health Care, Assembly Row (Teknion) (PX 29).[3] Tr. 69, 71, 87, 92, 102, 111, 114, 206, 1073, 1083, 1088, 1091. On each of these projects, Colonial installed a demountable glass partitions system. Tr. 147. In accordance with its well-established practice, Colonial assigned all of the installation to its Carpenters-represented employees, with the exception of the work involving the handling and installation of raw glass, in which case Glaziers-represented employees performed the work. Tr. 45, 83-86, 94, 99-100, 110, 114, 207.

On or about August 17, 2016, the Glaziers filed multiple grievances against Colonial, alleging that Colonial violated Article II of the Glaziers' collective bargaining agreement in its installation of frames, framed glass panels, the tracking and channels into which the panels were set and the doors and hardware on the five projects name above. JX 4. These grievances were all submitted to the New England Painting and Finishing and Glazing Industries District Council 35 Joint Trade Board ("JTB"), the labor management arbitration board designated in the Glazier's collective bargaining agreement to hear all contractual disputes, including jurisdictional disputes. On August 24, 2016, the JTB notified Colonial that a hearing on these grievances was scheduled for September 14, 2016. JX 4. The JTB did not issue a decision on

[3] The names in the parentheses are the product names of specific system installed on that job.

the assignment issue,[4] and the Glaziers filed an appeal with the American Arbitration Association, as provided for in Article XX of the agreement. JX 6; Tr. 53, 123.

Matt McKenna, Colonial's Vice President of Operations, testified that shortly after receiving notice of the JTB hearing, on or about September 7, 2016, he received a call from the Carpenters' Business Representative John Murphy, and that Murphy told him that if in response to the Glaziers' grievances, Colonial changed the assignment on the demountable partitions work, "there would be job site actions." Tr. 51.

New England Finish Systems ("NEFS") is, and at all relevant times has been, an interior systems subcontractor. Tr. 214, 217.[5] As an interior systems subcontractor, NEFS installs drywall, framing, demountable office partitions systems and doors and hardware. Tr. 217. NEFS also installs non-demountable aluminum frame partitions, made by such manufacturers as Raco, Frameworks and Wilson. Tr. 221, 1055. In recent years, at many commercial tenant build-outs, much of the permanent, metal stud and drywall offices, and many of the non-glass demountable partitions systems, were replaced by demountable glass partitions systems. Tr. 1055. In order to maintain its volume of work, NEFS added demountable glass partitions systems to the interior systems work it performs, with the Infinium demountable system being its primary demountable glass partitions system. Tr. 220, 302; EX 6; EX 9; EX 11. NEFS' President Ray Houle testified that a "demountable partition in my mind is something that can be taken apart and moved, reconfigured to another part of the floor, space, building." Tr. 223.

NEFS also performs what has been designated by architects as Division 10 work which consists of bathroom partitions and window treatments. Tr. 217, 1130-31. In recent years,

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[4] There were other aspects to the grievances, such as not having a pre-job conference or not registering the job, that were addressed by the JTB. JX 6.

[5] In this brief, Colonial and NEFS are collectively referred to as the "Employers."

NEFS added to its Division 10 scope of work the installation of shower doors and enclosures in multi-unit residential projects. Tr. 217. Shower doors and enclosures also have aluminum tracks and frames, work with which NEFS is familiar. NEFS and a related company, Paint Systems, Inc., as independent contractors, and not as members of the Painting and Finishing Employers Association of New England, Inc., have been bound to the Glaziers' collective bargaining agreement. PX 23; PX 31.[6]

On the demountable glass partitions system work, NEFS employs its Carpenters-represented employees for all work relating to the framed glass, tracks, channels, rollers, doors and hardware. Tr. 305, 309-10. Glaziers-represented employees are employed solely for the handling and installing of raw glass, which represents a very small percentage of NEFS' glass partitions work. Tr. 322, 1055-56. With respect to shower enclosures and shower doors, NEFS performs the work with a 50/50 composite crew of Glaziers-represented employees and Carpenters-represented employees. Tr. 227, 229, 238, 243, 312-312, 315; PX 4; EX 10.

In the summer of 2016, NEFS installed an Infinium demountable glass partitions systems at 125 High Street (floors five through nine), in Boston, Massachusetts. On the High Street project, there was no raw glass. Tr. 302, 306. NEFS also had the drywall contract at 125 High Street. Tr. 303. NEFS has no permanent full-time Glaziers-represented employees, and calls the Glaziers for referrals when it needs glaziers for short-term employment. Tr. 321, 469. The High Street demountable partitions installation was done by a crew of 6-10 of NEFS' Carpenters-represented employees. Tr. 302, 303, 305-06; EX 9. NEFS has approximately 160-250 full-time Carpenters-represented employees, with most of those carpenters having worked for NEFS for more than five years, and those carpenters perform all of NEFS' demountable glass partition

[6] For the purposes of this proceeding, the Carpenters are not distinguishing between work performed by NEFS and work performed by Paint Systems that it obtained through a subcontracting relationship with NEFS.

system work, except for the handling and installing of raw glass, which is handled and installed by NEFS' Glaziers-represented employees. Tr. 320-21.

On or about August 17, 2016, the Glaziers filed a grievance against NEFS, alleging that NEFS violated Article II of their collective bargaining by having its Carpenters-represented employees install the framed glass panels, the channels and tracks, the doors and the door hardware at High Street. JX 3. On September 13, 2016, this grievance was heard by the JTB. JX 3. The JTB did not reach a decision on the jurisdictional assignment issue, and the Glaziers filed an appeal with the American Arbitration Association, as provided for in Article XX of the collective bargaining agreement. JX 5; Tr. 309.

Ray Houle, NEFS' President, testified that after the Glaziers' JTB grievance was filed, he received a call from the Carpenters' Murphy, and was told that if in response to the Glazier's grievance, NEFS changed the assignment with respect to the demountable glass partitions systems, "there would be a job action." Tr. 310.

On or about August 4, 2016, NEFS notified the Carpenters and Glaziers that it had been awarded the contract for the shower doors and enclosures at Parcels B and C in the Seaport District, a large multi-unit, residential project, and that it intended to use a 50/50 composite crew of Glaziers and Carpenters for the work. PX 4. On August 16, 2016, the Glaziers, through their attorney Paul Kelly and their Director of Servicing Paul Canning, contested the assignment and claimed that employees represented by the Glaziers should perform 100% of the work. EX 10; PX 4; Tr. 312, 314. Shortly after receiving Mr. Kelly's email, Houle spoke with the Carpenters' Murphy. Houle testified that Murphy told him that if NEFS deviated from its 50/50 composite crew, "there would be a job action." Tr. 320.

II. WORK IN DISPUTE

There are two types of work in dispute: (1) the installation of demountable glass partitions systems, including both floor to ceiling systems (Federal Street, Berkeley Street, Dartmouth Street, Partners, High Street) and floor to some specified below ceiling height systems (Boston Public Library (Tr. 69)); and (2) glass shower doors and enclosures (Parcels B and C). With respect to the demountable partitions, the work described in the Notice Rescheduling Hearing and Clarifying Disputed Work appears to be more encompassing than just demountable systems or glass partitions," as it describes the work as:

> Work relating to the installation of glass/glazing, frames, tracks, glass doors, glass door hardware and rollers, glass partitions of any size, and backsplash or glass demountable partitions of any size at the following projects: (1) One Federal Street, 8th Floor, Boston; (2) the Boston Public Library College Planning Center; (3) One Memorial Drive, Cambridge, Microsoft; (4) 200 Berkeley Street, Floors 9-12, Boston; (5) Partners Health Care, Assembly Row, Somerville, as described in Case 01-CD-183838; and (6) 125 High Street, Boston, Floors 5-9, as described in Case 01-CD-183789.

However, when the record testimony is viewed in its in its entirety, it is clear that the work in dispute at the six construction sites referenced above is the installation of demountable glass partitions systems, and the other language in the Board's notice merely describes specific elements of the demountable partitions work. The more detailed language is derived from the Glaziers' grievances against the two employers, NEFS (JX 3) and Colonial (JX 4). The Glaziers' grievances describe the Glaziers' claim for the work performed by these two contractors without using the words "demountable" The reason the Glaziers avoid the word "demountable" is discussed in Sections VI and VII, below, but can be simply summarized as follows: employees represented by the Glaziers rarely install demountable partitions; so they attempt to avoid describing the disputed work in the language used by every contractor that performs the work, including Colonial and NEFS. Tr. 40, 111, 147, 221, 1056. McKenna

speaking of Colonial's five jobs said: "We were performing essentially the same work at each [site], installing office furniture and demountable partitions." Tr. 40. NEFS' Houle identified the Infinium partitions in EX 6 as "the kind of demountable partition that was installed at 125 High." Tr. 221.

The Glaziers testify that the term "demountable" is a "made-up word" (Tr. 665), notwithstanding the fact that the Glaziers include that exact term in the Trade Jurisdiction section of their collective bargaining agreement (JX 2, Article II, Section 2A (3rd line from the bottom)), and the fact that the term is used throughout the United States. *Glaziers District Council 16 (Malv. Inc. d/b/a Service West* and *Carpenters 46, (Northern California Counties Conference Board)*, 356 NLRB 760, 761 (2011) (10(k) (California dispute between Carpenters and Glaziers over demountable partitions). The practice with respect to demountable partitions is so unfavorable to the Glaziers' claim that they even attempt to deny that the word is in their collective bargaining agreement. Tr. 1142. Notwithstanding the Glaziers' refusal to use or recognize the word "demountable," the work in dispute at each of the six construction sites is a demountable glass partitions system, with each installation containing some or all of the elements listed in the Glaziers' grievances and in the Board's description of the Disputed Work, such as frames, tracks, doors, door hardware and glass partitions. Tr. 40, 69, 76, 143-146, 302, 305-06; EX 1; EX 2; EX 6; EX 9; PX 1 .

III. CARPENTERS' CONTENTION

The Carpenters contend that there are competing claims for the work in dispute. The Carpenters do not admit that they have engaged in proscribed conduct, but acknowledge that the Employers have presented evidence in support of their contention that there is reasonable cause to believe that the Carpenters used proscribed means to enforce their claim to the work in

dispute. Further, the Carpenters contend that there is no agreed upon voluntary method to adjust the dispute within the meaning of Section 10(k) of the National Labor Relations Act (the "Act") and Section 10216 of the NLRB's Rules and Regulations.

IV. APPLICABILITY OF STATUTE

A. There Is Reasonable Cause to Believe That There Are Competing Claims and Proscribed Conduct

As a prerequisite to the Board proceeding with a jurisdictional assignment determination under Section 10(k) of the Act, there must be reasonable cause to believe that there are competing claims to the work in dispute between rival groups of employees and that one of the competing parties has used proscribed means to enforce this claim to the work in dispute in violation of Section 8(b)(4)(D) of the Act. *Glaziers District Council 16 (Malv, Inc. d/b/a Service West and Carpenters 46, Northern California Counties Conference Board),* 356 NLRB 760, 761 (2011) citing *Carpenters Local 624 (T. Equipment Corp.), 322 NLRB 428, 429 (1996).* In addition, the Board will not reach the merits of the work in dispute if there is an agreed upon method for voluntary adjustment of the dispute by all of the parties. *Glaziers District Council 16 supra,* 761, citing *Electrical Workers Local 3 (Slattery Skanska, Inc.),* 342 NLRB 173, 174 (2004).

There is no dispute that both the Glaziers and the Carpenters claim the demountable partition work in dispute. In response to the work being assigned to the Carpenters, the Glaziers filed multiple grievances against NEFS and Colonial. JXs 3 and 4. The Glaziers pursued each of these grievances to a hearing before the JTB, a labor-management arbitration board established under the Glaziers' collective bargaining agreement for resolving all grievances, including jurisdictional disputes. JX 2, Article XIX. After the JTB did not decide the jurisdictional assignment aspect of the grievance, the Glaziers filed for arbitration with the

American Arbitration Association under Article XX, Section 2 of its agreement. Tr. 53, 309. With respect to the shower door work at Parcels B and C in the Seaport District, and in response to NEFS' assignment to a 50/50 composite crew of carpenters and glaziers, the Glaziers' attorney and Canning claimed 100% of the shower door work. Tr. 241, 314; EX10; PX 4.

The Carpenters also claim the work in dispute. First and foremost, the Carpenters' claim for the work is found in Colonial's and NEFS' assignment of that work to employees represented by the Carpenters at the six demountable partition jobsites and for the shower door and enclosures at Parcels B and C in the Seaport District. PX 4; EX 10. It is undisputed and uncontested that Carpenters-represented employees performed or are performing the disputed work on the six demountable partitions projects and the one shower door project. The Board holds that the assignment of the work by an employer and the performance of that work by the employees represented by a particular union, constitutes a claim for the work by that particular union within the meaning of Section 10(k) of the Act. *Glaziers District Council 16*, supra 762, citing *Electrical Workers Local 134 (Pepper Construction Co.),* 339 NLRB 123, 125 (2003).

In support of their contention that there is reasonable cause to believe that the Carpenters used proscribed means to enforce their claims, the Employers presented the following evidence: (1) McKenna testified that on or about September 7, 2016, after Colonial had been brought before the DC 35 JTB with respect to the assignment of the demountable partitions work at One Federal Street, the Boston Public Library, One Memorial Drive, 200 Berkeley Street and Partners Health Care, he received a call from the Carpenters' Murphy who told him that if Colonial changed its assignment of demountable glass partitions work, there would be "job actions." Tr. 51, 125. McKenna testified that on or about September 12, 2016, he spoke to Murphy again about three other demountable partition projects that were coming up, and that Murphy, once

again, told him that if Colonial changed its assignment away from the Carpenters for the installation of the demountable partitions work, there would be "job actions." Tr. 52, 127. McKenna testified that at the time of both of these calls, Colonial had several months of work remaining at the Partners site, and had carpenters working at approximately 20 other projects in the Greater Boston area. Tr. 40, 70, 71, 81, 133-34. In addition, Colonial is signatory to an agreement with the Carpenters covering its carpentry work in all six New England states and employs carpenters throughout the Carpenter's geographic territory at all times throughout the year. Tr. 475-477. McKenna understood that all of his projects in New England were potential targets for picket lines, regardless of whether there was demountable partitions work at the sites. Tr. 123, 135 ("It's my opinion though, if you're going to get picketed by a Union, they're going to picket everywhere. So not necessarily just on those job sites.")

Ray Houle, President of NEFS, testified that after NEFS was called to appear before the JTB with respect to the demountable glass partitions system at 125 High Street, he received a call from Murphy, and during this call, Murphy told him that if he reassigned the work to the Glaziers, there would be a "job action." Tr. 310. Houle also testified that on or about September 13, 2016, after he had been informed by Kelly and Canning, that the 50/50 composite crew of carpenters and glaziers that NEFS had utilized for the installation of shower doors on two recent projects, was not acceptable to the Glaziers for the Parcels B and C project in the Seaport District, and that the Glaziers were claiming 100% of the work (Tr. 314; PX 4; EX 10), he again spoke with Murphy. Houle testified that Murphy told him that if he did not use the 50/50 composite crew that he had used on two previous projects, there would be a "job action." Tr. 320.

The Glaziers subpoenaed Murphy to testify at the 10(k) hearing, and his testimony in responses to questions from the Glaziers' attorney were consistent with Houle's and McKenna's testimony. Tr. 441, 444-45. Murphy also testified that when he spoke with McKenna, he was not aware of the specific grievances that were before the JTB; but rather he was responding to a "pervasive problem" of the Carpenters' work being challenged throughout the area; i.e. he did not want Colonial to change its assignment at the Partners job or at any of the other approximately 30 demountable glass partitions jobs Colonial did each year. Tr. 446. The Glazers were filing multiple grievances against Colonial, and many of the Carpenters' signatory furniture contractors (NEFS, East Coast Office Installations, Boston Install, Johnson & Goglia) (Tr. 53; EX 12), and Murphy was concerned that Colonial, due to the pressure from the grievances, regardless of whether the job on which the grievance arose was completed, would change its assignment practice on the approximately 30 demountable glass partitions jobs it has each year. Tr. 446.

The Glaziers appear to argue that there is not reasonable cause to believe that there was a violation of 8(b)(4)(D). The Board's standard is well established:

> It is well established that as long as a Union's statement on its face, constitutes a threat to take proscribed action, the Board will find reasonable cause to believe that the statute has been violated, in the absence of affirmative evidence that the threat was a sham or was the product of collusion.

Lancaster Typographical Union No. 70 (C.J.S. Lancaster), 325 NLRB 449, 450-451 (1998). In order to satisfy this "affirmative evidence" standard, there must be a direct admission of cooperation between the employer and preferred union. *Laborers Local 271 (New England Foundation Co.),* 341 NLRB 533, 534 (2004)(where the evidence does not demonstrate that any individual admitted to collusion, there is no affirmative evidence that the threat was a sham and a product of collusion.) There is absolutely no evidence of collusion or cooperation between the

Carpenters and NEFS or the Carpenters and Colonial. In fact, the evidence is to the contrary. Tr. 445-46. Moreover, there is no evidence that Murphy or the Carpenters wanted NEFS or Colonial to initiate a 10(k) proceeding. In fact, the evidence is to the contrary. Tr. 446. However, even if there were such evidence, the mere fact that a union wants or prefers an employer to initiate a 10(k) proceeding, is not affirmative evidence of collusion or a sham threat. *International Union of Operating Engineers, Local 150 (R&D Thiel)*, 345 NLRB 1137, 1140 (2005).

From the cross-examination of witnesses at the hearing, the Glaziers also appear to contend that since four of the five Colonial projects were completed at the time of McKenna and Murphy's calls, there could be no proscribed conduct. This conveniently overlooks the following critical facts: (1) the Partners job had approximately three to four more months of work, with Colonial having 30-40 Carpenter installers working on that project alone (Tr. 70-71, 80); (2) Colonial had approximately 20 other ongoing projects employing carpenters within the Carpenter's jurisdiction and had approximately 30 demountable glass partitions each year; (Tr. 133); and (3) the Glaziers were filing multiple grievances against all of the Carpenters' signatory furniture contractors, and claiming the demountable glass partitions systems work throughout the Carpenters' area, not just on the five Colonial jobs identified in the Board Notice. They were also pursuing those grievances to arbitration. It is uncontested that the Glaziers' intention and strategy in filing the grievances was to pressure Colonial and other furniture contractors to change their assignment practice, not only on the five jobs that were at issue in the grievances (JX 3), but on all jobs in the area. Tr. 970-76; PX 25. They were filing grievances on multiple Colonial jobs, not just the jobs that are the subject of this 10(k) proceeding.

Therefore, there is reasonable cause to believe that there are competing claims for the work, and the Employers presented sufficient evidence to find that there is reasonable cause to believe that the Carpenters used proscribed means to enforce its claims to the work in dispute.

B. There Is No Agreed Upon Method of Voluntarily Resolving The Work In Dispute

The Glaziers' collective bargaining agreement provides that all grievances shall be heard and adjudicated by the JTB (JX 2, Article XIX, Section 4), and further provides for a right of appeal of a JTB decision to an impartial arbitrator appointed by the American Arbitration Association. JX 2, Article XX, Section 2. The Glaziers' collective bargaining agreement does not contain a separate procedure for the resolution of jurisdictional disputes. Consistent with this single resolution procedure for all grievances, the Glaziers filed and pursued two-party grievances related to the assignment of the work in dispute in this proceeding under Article XIX of their agreements. JXs 3 and 4.[7]

The Carpenters' collective bargaining agreement has the following separate and distinct language for the resolution of jurisdictional disputes:

> Work assignments shall be made by the Employer in accordance with the present decisions and agreements of record in area practice.
>
> In the event a jurisdictional dispute arises **the disputing union** shall request the other union or unions involved to send representatives to meet with representatives of the Union and Employer to settle the dispute. If the above procedure or any other mutually agreed upon procedures fails to resolve the problem, then the Employer at the request of the Union, agrees to participate in a tri-partite arbitration with all the disputing parties. The impartial umpire to hear the dispute can be mutually agreed upon by the parties, or appointed by the American Arbitration Association.
>
> Decisions rendered by any of the above procedures shall be final, binding, and conclusion on the **Employer and the Union parties to this agreement**. There shall be no strikes, picketing or lockouts over any jurisdictional disputes.

[7] Many construction industry collective bargaining agreements exclude jurisdictional dispute grievances from the standard grievance procedure, and handle those grievances through a separate procedure. JX 1, Article 26 ("In the event a grievance arises, other than jurisdictional disputes...."); CX 5, Massachusetts Laborers Agreement, Article XXV, Section 2 ("In the event a grievances arises other than a jurisdictional dispute....").

JX 1, Article 2 (emphasis added). This language sets forth the factors to be considered by the arbitrator (i.e. "decisions and agreements of record and area practice") in making his or her determination, and this is critical and necessary language for resolving jurisdictional disputes. Any legitimate and effective contractual jurisdictional dispute resolution procedure must have a standard for the arbitrator to apply, just as there is a standard for the Board in 10(k) proceedings.

The Glaziers apparently contend that they are a "party" to the Carpenters' agreement. However, as testified to by Al Peciaro, the Carpenters' Director of Contractor Relations, the Article 2 language only applies to the signatory employer associations (i.e. the Associated General Contractors of Massachusetts, the Building Trades Employers Association and Construction Industries of Massachusetts) and other unions who have agreed to the same tri-partite language with the same contractor associations. Tr. 499-501.

In accordance with the basic principle of contract interpretation, in order to give a consistent meaning to the entire section, the phrase "disputing unions" must be interpreted in the context of the other words and phrases in the same section. Article 2 also states that the arbitrator's decision under the Carpenters' jurisdictional dispute resolution section is binding on the "Union parties to this agreement." "Union parties to this agreement" can only mean unions who are signatory to collective bargaining agreements with the same employer associations containing the same jurisdictional resolution dispute language, such that all three of the disputing parties are bound to the same dispute resolution language. From that Article 2 language, it is evident that a "non-party" union, such as the Glaziers, has no contractual right to file a grievance under the Carpenters' collective bargaining agreement.

It is the Carpenters', the AGC's and the BTEA's interpretation of their own agreement that the Article 2 jurisdictional dispute procedures are only available to unions signatory to an

agreement with the AGC and BTEA that contains the same language. Tr. 542-43. The requirement that a union be signatory to the same language with the same employer association is apparent from the AGC's and BTEA's action of including the nearly identical language in their collective bargaining agreement with the Laborers. Tr. 499-503, 540-42.[8] The Laborers' agreement contains the identical standard for the arbitrator as is found in the Carpenters' agreement ("decisions and agreements of record and area practice"). Tr. 501, CX 5. The only difference in the two dispute resolutions procedures is the minor difference that the Laborers' agreement has an intermediate, pre-arbitration step of a meeting with International Union representatives, and the Carpenters' Agreement does not have that step. Tr. 502, CX 5. Article VI.

Further evidence that the Glaziers are not a "disputing union" under this provision of the Carpenters' agreement is found in the Glaziers' conduct with respect to the work in dispute. Their response to what they believed to be violations of the assignment provisions in their collective bargaining agreement was to file two-party grievances against NEFS and Colonial, JXs 3 and 4. At no time, did the Glaziers attempt to file a grievance under the Carpenters' collective bargaining agreement, or initiate any three-party proceeding. As recently as October 11, 2016, after the conclusion of their JTB hearings, and at first day of hearings in this Section 10(k) proceeding, the Glaziers continued to acknowledge that there was no agreed upon method to resolve these disputes and agreed to the following stipulation: "There is no agreed upon method for voluntary adjustment for the work in dispute in question which would be binding on all parties." BX 2, Stipulation. On November 28, 2016, the Glaziers withdrew from the Stipulation, and for the first time, contended that there is an agreed upon method for resolving

[8] The Carpenters and the Laborers are the two trades with whom the ACG members historically had jurisdictional disputes. Tr. 499, 541.

the dispute under the Carpenters' agreement. Tr. 27. This contention fails under the applicable Board law, as well as under the clear language of Section 10(k) of the Act that requires notice to the Board within 10 days of the 8(b)(4)(D) charge being filed that there is an agreed upon method for voluntary adjustment of the dispute.

The Board holds that two disputing unions' contracts must mandate the same method of resolution. *Operating Engineers Local 150 (Diamond Coring, Co., Inc.)*, 331 NLRB, 1349, 1350 (2000). For purposes of 10(k) jurisdiction, all parties, including the employer, must be bound to the same dispute resolution mechanisms. *IBEW Local 3, (Slattery Skanska)*, 342 NLRB 173, 175 (2004); see *Laborers Local 217 (New England Foundations Co., Inc.)*, 341 NLRB 533, 535 (2004)(no agreed upon method when one agreement contains tripartite arbitration and the other agreement does not); *Laborers Local 242 (Johnson Western Guinite Co.)*, 310 NLRB 1335, 1337 (1993)(no agreed upon method when agreement contains significant differences). The same principles are set forth in Section 10216 of the NLRB's Rules and Regulations. There is an agreed upon method for the voluntary adjustment of disputes when all of the parties "to the dispute are bound by the same arrangement for the resolution of their dispute." Section 10216 provides an example of such an arrangement - when there is a contractual agreement or stipulation to submit a dispute to the Plan for Settlement of Jurisdictional Disputes established by the Building & Construction Trades Department of the AFL-CIO.[9] In accordance with this example, the Carpenters, Laborers, the AGC and BTEA would have an agreed upon method for voluntary adjustment, but the Glaziers do not, as they are

[9] The Carpenters are not stipulated to or party to the Plan for Settlement of Jurisdictional Disputes. Tr. 512. The demountable partitions work is generally excluded from project labor agreements which have their own jurisdictional dispute resolution procedures. This was the case with the Partners Health project PLA. Tr. 516, 976. The exclusion of "furniture" work from project labor agreements is not surprising, in light of the fact that such agreements are between Building Trades Union and general contractors, and the furniture work is not part of the general contractors' scope of work. Tr. 536.

signed to their own agreement with a different multi-employer association and with different contract language.

Where the Carpenters' and Glaziers' agreements have significantly different contract language for the settlement of jurisdictional disputes, and where their agreements are with entirely different employer associations, the Glaziers cannot defeat the Board's jurisdiction in a 10(k) proceeding, merely by offering to participate in a grievance procedure in another contract to which they are not a party, and that by its very own terms, is not binding on unions who are non-parties, especially after the Glaziers unsuccessfully pursued the same grievances through their own two-party procedures. JX 5; JX 6.

Therefore, there is no agreed upon voluntary method to adjust these disputes, and the Board should determine the dispute on the merits.

V. MERITS OF THE DISPUTE

A. Collective Bargaining Agreements – Demountable Partitions

Since 1992, Colonial has been signatory to a collective bargaining agreement with the Carpenters. Tr. 141. The collective bargaining agreement covers all of the individual elements of the work involved in the installation of demountable glass partitions systems. The Carpenters' Director of Contractor Relations, Al Peciaro, reviewed the relevant portions of the collective bargaining agreement with respect to the demountable partitions and shower door work. Peciaro testified to the following relevant collective bargaining agreement references: (1) the erecting of structural parts of a house, building, or structure made of **wood or any substitute**, such as plastics or **composition materials**... JX 1, p. 5 Tr. 488; (2) Erection of all wood, **metal**, plastic, and **composition partitions**.... JX 1, p. 5; Tr. 488-89; (3) fastening on of all wooden, plastic, or

composition **cleats** to iron work or on other material.... JX 1, p. 6; Tr. 491[10]; (4) the hanging, setting and installation of wood, metal or plastic **doors, sash, jambs, bucks, casings**, putting on of all **hardware**.... JX 1 p. 7; Tr. 492[11]; (5) **furniture**.... p. 7; Tr. 493; (6) fitting, installation, fastening, **stops, beads and molding on doors** and windows; the installation of **all moldings**, made of wood, metal, plastic or composition; setting and hanging of all **sash, doors...and other frames**. JX. 1, p.7; Tr. 493; (7) putting on weather strips and caulking... JX. 1, p. 7; Tr. 493; (8) **Partitions**, pre-cut and pre-fit trim and **doors... sash, doors**, trim, molding, screen and storm sash and doors.... JX p. 11; Tr. 494; and (9) assembling, handling of or the manufacturing of all wood, **metal** or plastic materials or products, also including the assembling, putting together of work after same has been machined, hand worked, or shaped JX 1, p. 11; Tr. 494. NEFS' Houle identified the Infinium demountable system that NEFS installed at 125 High Street as an acoustical partition, and also pointed out that the Carpenters' agreement covered "acoustical systems." Tr. 302-03; JX 1, p. 7.

In addition to this breakdown of the specific provisions in Article 1 of the Carpenters' collective bargaining agreement, relating to the installation of demountable partitions systems, the agreement contains a Furniture Addendum that was negotiated by the Carpenters and the BTEA in 2012. Tr. 494. The BTEA's furniture contractor members, including Colonial, participated in the 2012 special, break-out negotiations to address specific issues in the furniture industry, and in particular, the inability of the signatory furniture contractors to compete for work outside of the downtown Boston area. Tr. 498, 531. The Carpenters and the furniture

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[10] Peciaro explains that a cleat is "an old word" but has the same meaning as a "track" or "channel" utilized in a demountable wall system. Tr. 491-492.

[11] Peciaro explained how the references to metal, doors, sash, jambs, bucks, casings and hardware all cover the installation of the shower doors and office partition doors framed in aluminum. He also explained that "sash" is just a framed piece of glass, and covers the framed glass partition panels, just as it covers a traditional, framed double-hung window. Tr. 492-93. NEFS' Houle also testified to a similar definition of "sash." Tr. 388-89.

contractors had been discussing the issues unique to the furniture industry since 2006, culminating in the inclusion of the Furniture Addendum in the 2012 agreement. Tr. 495. The Furniture Addendum starts with the following language:

> The following terms and conditions apply only to the office furniture/FF&E (Furniture Fixture Equipment) Industry which is defined to include demountable partitions, cubicles, knock down work stations, file cabinets, desks, chairs, credenzas and other free standing or wall mounted furniture.

JX 1.

As testified to by Peciaro, in the Furniture Addendum negotiations, the parties began by defining the work already being performed by those contractors under the agreement in order to define the scope of work that would be covered by the Addendum's concessions. Tr. 537. As testified to by Peciaro and Myles Twomey of East Coast Office Installation, the Addendum did not add any work to the collective bargaining agreement (Tr. 497, 537), but rather established concessions for the already covered work, in order that the signatory furniture contractors could be more competitive, particularly outside of Boston. Tr. 494-497. There is no dispute, and it is uncontested, that Carpenters-represented employees performed the work both before and after the addition of the Furniture Addendum. Tr. 275, 497, 537.

While the Glaziers' collective bargaining agreement contains the phase "demountable glazing systems," the agreement's emphasis on the work in dispute pales in comparison to the Carpenters' agreement's focus and special section on the industry and its attempt to address the signatory contractors' lack of competitiveness in certain geographic areas. This special section indicates the importance of that sector of work to the parties. It is more than a few words in a multiple page listing of various types of work that is commonly found in building trades' collective bargaining agreements. The importance of that work is further supported by the

significant number of hours of work performed by Carpenters-represented employees discussed in Section VI and VII below.

The collective bargaining agreement factor favors an award to employees represented by the Carpenters with respect to the demountable partition wall systems.

B. The Collective Bargaining Agreement-Shower Doors

The Carpenters' collective bargaining agreement specifically covers the installation of doors and the components related to the installation of doors, such as door hardware. As discussed above, Article 1 contains numerous references to doors, sash, jambs, bucks, and casings, all elements of door installation. The Carpenters' collective bargaining agreement does not distinguish between exterior doors, interior office doors or shower doors. As testified to by Peciaro "a door is a door." Tr. 509. Similarly, the term "sash" (glass in a frame) is used throughout Article 1, without being limited to traditional, double-hung exterior windows, and clearly covers a framed glass door Tr. 388-89, 492. Significantly, the Glaziers do not present any evidence contesting the definition of "sash" as any glass within a frame.

Therefore, the collective bargaining agreement factor favors an award to employees represented by the Carpenters with respect the installation of shower doors.

VI EMPLOYER'S PREFERENCE, CURRENT ASSIGNMENT AND PAST PRATICE

A. Colonial

Colonial's work is 50% traditional furniture and 50% demountable partitions. Tr. 57. Colonial performs approximately 30 demountable glass partition jobs per year. Tr. 132. Ninety-five percent of its labor is performed by carpenters. Tr. 38, 151. Colonial prefers that the work in dispute (e.g. the installation of demountable glass partitions systems) be assigned to employees represented by the Carpenters in accordance with its past practice dating back to

1992. Tr. 54-55, 83-86, 94, 96, 121, 141, 151, 153-54. Colonial's past practice is for its Carpenters-represented employees to install all demountable systems, regardless of the material, except for systems that include raw glass, in which case the raw glass is handled and installed by its Glaziers-represented employees, and all of the other work is performed by its Carpenters-represented employees. Tr. 46, 64, 96, 114, 164, 1067. When the glass partitions arrive at the jobsite in aluminum frames, Colonial's past practice is for its Carpenters-represented employees to install the entire demountable glass partition system, without any glazier participation. Tr. 94, 131. So Colonial's Carpenters-represented employees install the framed glass panels, the tracks into which the panels are set, the doors and the door hardware. Tr. 94, 121, 131. When there is raw glass and the frames have to be built at the jobsite, Colonial's Carpenters-represented employees build and install the frame system into which the Glaziers-represented employees place the raw glass. Tr. 131.[12] The Carpenters are not claiming the handling and installing of this raw glass; so it is not in dispute. Tr. 420-21, 424. On the five Colonial projects in dispute in this proceeding, there was raw glass on the Partners project, and possibly on the 1 Memorial Drive project, while on the other projects, the glass arrived pre-framed, and there was no work for the Glaziers-represented employees. Tr. 82, 96, 99, 111-13, 114, 121, 206-07.

Colonial's stated practice of assigning all of the demountable partitions installation work to its Carpenters-represented employees is borne out by the number of carpenters it employs compared to the number of its glazier employees. Colonial has a core of sixty to ninety full-time carpenters, and no full-time glaziers. Tr. 141. Colonial does not have regular work for glaziers, and when it has a contract that involves the installation of raw glass, it calls the Glaziers Union for short-term referrals. After the raw glass work has been completed, those glaziers do not

[12] When there is a minimal amount of work involving the handling and installation of raw glass, not sufficient to employ glaziers for a full day, that work is also performed by Colonial's carpenters. Tr. 49.

remain in Colonial's employ. Tr. 65, 141. The aggregate work hours are also indicative of this practice. In the nine years between 2008 and 2016, Colonial employed carpenters for 997,714 hours of work and glaziers for 24,905 hours of work. EX 5. These hours represent an overwhelming past practice of having carpenters install the work in dispute, and having Glaziers perform the minimal amount of work of handling the raw glass, which is not in dispute.

Therefore, the factors of Colonial's preference, current assignments and past practice favor an award to employees represented by the Carpenters.

B. NEFS

NEFS prefers that the disputed demountable glass partitions system work be assigned to employees represented by the Carpenters. Tr. 309-10, 1057. NEFS assigned the disputed work at 125 High Street project work to its Carpenters-represented employees (Tr. 302), and that assignment was consistent with NEFS' assignment of demountable partition work for the past 28 years, and with its assignment of demountable glass partitions for the past year and one half. Tr. 1055-56. NEFS performs approximately 15-20 demountable partitions projects per year, 80% of which are now glass partitions systems. Tr. 225. Those 15 to 20 jobs constitute approximately $3 million of work, with glass partitions accounting for 80%, or $2.4 million, of that work. Tr. 225; EX 11. The 125 High Street project involved the installation of an Infinium demountable glass partitions system. Tr. 219-21; EX 6.[13] Prior to the 125 High Street project, NEFS had installed five Infinium demountable wall systems, and on each installation, NEFS assigned all of the disputed work to its Carpenter-represented employees. EX 11; Tr. 324.[14]

[13] Note that the Infiinium system is marketed as Infinium's classic line of **moveable** glass wall systems." EX 6 (emphasis added).

[14] While the Carpenters do not claim the handling and installation of raw glass on demountable glass partition systems, on the 125 High Street all the glass arrived at the jobsite pre-glazed and pre-framed. Tr. 302.

NEFS' involvement with shower door installation is more recent. Tr. 300-01. However, prior to the Parcels B and C project that is in dispute, NEFS had recent contracts for two large shower door installation projects, each with more than 300 units. Tr. 227, 229, 234, 300-01. At the hearing, these jobs were referred to as "Avalon Bay One on Stuart Street" and "Avalon Bay Two on Nashua Street." Tr. 227, 234. On each of the Avalon Bay projects, NEFS assigned the shower door installation to a 50/50 composite crew of carpenters and glaziers. Tr. 229, 238. Not only did that 50/50 composite crew establish NEFS' past practice, but on each job, the 50/50 composite crew was agreed to by the Carpenters and Glaziers. Tr. 229, 243, 297, 348, 355.

After the completion of the Avalon Bay projects with the composite crew assignments that were agreed to by the Carpenters and Glaziers, not surprisingly, NEFS assigned the disputed work at Parcels B and C to the same 50/50 composite crew. Tr. 312. Although prior to Parcels B and C, NEFS only had two previous shower door projects, they were two large projects, and more significantly, they resulted in an agreed upon composite crew by the two unions. Tr. 229-30, 243, 297, 348, 355. So in making the composite crew assignment on Parcels B and C, NEFS was not only making the assignment in accordance with its preference and its past practice, but also in accordance with the agreements that the three parties reached on NEFS' two previous jobs.

The Glaziers attempt to undermine and explain away the critical fact that on each of the Avalon Bay jobs there was an agreement between the two unions. The Glaziers imply that they agreed to the 50/50 composite assignment in order to maintain a good relationship with their signatory contractors. "And the reason that we reached an agreement...I didn't want to sour that relationship." Tr. 949 (Avalon Bay One). "I'm trying to work with the contractor...we ended up saying we'll do it two and two." Tr. 958. (Avalon Bay Two). Regardless of the reason for the

agreement, there was an agreement and a practice involving more than 600 shower door and enclosure installations.

Therefore, the factors of NEFS' preference, current assignment and past practice favor and award to employees represented by the Carpenters.

VII. AREA PRACTICE

A. Demountable Partitions

The work in dispute on the six jobs (five by Colonial and one by NEFS) is the installation of demountable glass partitions systems by "furniture" contactors, and the area practice with respect to that work is what must be examined. Tr. 57, 132, 147, 254-55, 265, 304, 358-59, 416-17, 493, 1068 and 1070; CX 1; CX 2. While the Notice of Hearing mentions many of the specific components of a demountable system (i.e. glass, aluminum frames, doors), each of these components is part of the demountable system. Understanding the distinction between the installation of demountable partition systems as a whole and the installation of individual components that may be found in a demountable system, is critical to the Board's determination of what is the relevant area practice. The demountable systems are a separate and distinct sector of the construction industry; although the systems may contain components that are found in other aspects of the construction industry, such as glass. However, the practice of installing a glass door on the street or in the mall is not relevant to the practice of installing a demountable glass partitions system that happens to have a glass door.

The question is not whether Glaziers-represented employees install glass at the front of stores or mall entrances or a permanent wall in an office, but whether they install glass as part of a demountable partitions system. While the Glaziers' grievances (JX 3 and JX 4) break down the disputed work into individual components, those component are taken out of context in order

for the Glaziers to be able to present some area practice that could support an assignment to Glaziers-represented employees, since they have an extremely unfavorable area practice in the installation of demountable partitions, glass or otherwise. The Carpenters do not contest that there is a practice of employees represented by the Glaziers installing glass to a street store front or mall entrance or sometimes fabricating and building a permanent glass wall, but that practice is not the relevant area practice for this dispute. The relevant practice is the installation of demountable glass partitions systems. The Board has recognized the distinct nature of the furniture industry and of demountable partitions in the one 10(k) case addressing this issue. *Glaziers District Council 16 (Malv Inc.)* 356 NLRB 760 (2011).

The "furniture" contractors obtain this work directly from manufacturers/suppliers, who enter into purchase and install contracts with owners for a particular demountable partition system. Tr. 77, 78, 231. The demountable glass partitions systems used in the Boston area are: Infinium (125 High Street), Teknion (Partners), Environamics (200 Berkeley Street), Carveart, Steelcase (1 Federal Street), Heyworth, DIRTT, International Office Concepts, Faro and KI Genius (Boston Public Library). Tr. 54, 64, 87, 159, 206, 224, 258, 329, 330.

All of the glazing contractors who testified at the hearing admitted that they do not have relationships with these demountable partitions systems manufacturers/suppliers and do not have certifications from any of the manufacturers which authorize them to install their products. Tr. 726, 734, 925-26, 846. Dean Curtin of Custom Glass and Aluminum admitted to not having any certifications from demountable manufacturers, and more pointedly, testified that he does not like to install other people's materials and has no interest in installing demountable systems like Infinium or Teknion, even if that is what an owner wants. Tr. 726. Similarly, Richard Mauro of Metro Glass and Metal testified that his company does not install demountable systems

and his "company's not interested in doing the installation of product that the owner has selected through some supplier or manufacturer.... Tr. 734. John Surpernaut of Assured Glass and Aluminum testified that his company has never worked with the Teknion system, an Infinium system or an Environamics system, and is not certified or authorized to install them if asked to do so by an owner. Tr. 825-26. Robert Manning of Modern Glass and Aluminum has never worked with any of the demountable partitions system manufacturers, such as Infinium, Teknion and Environamics, and is not certified or authorized to install them if asked to do so by an owner. Tr. 846. The Glaziers' Apprenticeship Training Director, Tom Falter, testified that he is not familiar with the products being installed on the six disputed projects. Tr. 628. As a result of the Glaziers' signatory contractors not having these business relationships and certifications, by their own admission, they could not have installed any of the demountable glass partition systems that the owners on the six projects in dispute chose for their offices.

Approximately ten years ago, the demountable partitions industry switched from other materials to glass. Tr. 60, 418-19, 538. Prior to this switch in materials, the non-glass demountable partitions were installed by the local area furniture contractors: Colonial; East Coast Office Installations; Interstate Office Partitions; O'Brien Installations; Johnson and Goglia, Boston Installations; and NEFS. Tr. 158-59, 416, 545. After the switch to glass, the demountable partitions systems continued to be contracted exclusively to the same furniture contractors who previously installed the demountable, non-glass partitions systems. Tr. 149-56, 222, 358-59, 418-19, 514, 1056, 1068. These furniture contractors continued to use their same crew of Carpenters-represented employees to perform the glass partition work as they did with the non-glass partitions. Tr. 252-53, 287. As testified to by McKenna of Colonial, one of the largest furniture contractors: "I don't consider them to be – first of all, I don't call them glass

systems. I call them demountable partitions. So, all of the ones - - all of the demountable partitions, whether they include glass or they don't include glass, I consider demountable." Tr. 121. The glass was just another material used in the demountable systems that these contractors had been installing since the 1980s.

All of the furniture contractors have been signatory to collective bargaining agreements with the Carpenters for decades. Tr. 416. At the request of the Carpenters, many of its signatory furniture contractors signed agreements with the Glaziers for the sole purpose of handling the raw glass, which the Carpenters agreed should be installed by Glaziers-represented employees. Tr. 38, 253, 278.

In about 2003, on one of the early demountable glass partition wall systems project in Boston, representatives of the Carpenters and Glaziers met and agreed that the Carpenters would perform all of the work, except for the handling and installation of the raw glass. Tr. 422. While the Glaziers acknowledge that there was such an agreement, they attempt to minimize the significance of the agreement by contending: (1) that it was a one-job, non-precedential agreement (Tr. 657-58); and (2) that it was part of a broader agreement with the contractor on the job, Structure Tone. As to the first contention, Murphy sums up it best: "Verbal and a handshake too. That was - - that agreement we had in place, in my mind. I never heard anything about it for about ten years...No grievances were brought to my attention by any other trade in that period of time.... Tr. 422. "After that (the meeting) we never had any disputes.... it set a precedent. We all understood how, not formal precedent, but.... Tr. 466. As to the second contention, if there was a broader agreement where the Glaziers were giving up their work, one must ask what did the Glaziers receive in return from Structure Tone. Tr. 657. The other part of the agreement with Structure Tone was that Structure Tone was allowed to abrogate its

agreement with the Glaziers. Tr. 657.[15] That does not appear to provide anything in return. What the Glaziers gained from the agreement had to be the "raw glass." It appears that the Glaziers were awarded the raw glass, and in return, allowed Structure Tone to abrogate its agreement. And the practice that followed for the next ten years is consistent with Murphy's accounting of what was agreed upon; (i.e. the Glaziers-represented employees handle the raw glass, and the Carpenters-represented employees perform all of the other work related to the installation of the demountable glass partitions systems).

A few years later, Topps, a New York contractor had a major demountable glass partition job at the Ropes & Gray law front, approximately 750 office fronts. Topps met with Murphy and informed him of its intent to use Carpenters-represented employees for all of the work, including the raw glass. Murphy informed Topps of the recently agreed upon practice in Boston, and Topps assigned the raw glass to the Glaziers. Tr. 423-24. On this massive project , Glaziers worked side by side with Carpenters, with the Glaziers only handling the raw glass. The Glaziers did not dispute the assignment or file any grievances.

Around this time, the Glaziers became signatory to collective bargaining agreements with many of the furniture contractors for this raw glass work only (Tr. 38, 61, 254), and these contractors assigned the work in accordance with this agreed upon practice. Tr. 422, 429. The Glaziers' acceptance of this practice is evidenced by the fact that prior to 2016, it rarely filed grievances against the contractors claiming the disputed work. Tr. 256, 331.

The Glaziers' contention that the reason they did not file grievances was that they did not know that Carpenters-represented employees were preforming the work they claimed, is not supported by the evidence. The Carpenters were performing approximately 420,000 hours of

[15] There are conflicting recollections as to the actual job on which this dispute arose (Tr. 421, 653), but no dispute as to the meeting occurring and that an agreement was reached.

work per year for the furniture contractors, of which approximately 50% of the hours were for demountable systems. EX 5; Tr. 515. Between 2008 and 2015 (eight of the years when the Glaziers did not file grievances), Colonial employed carpenters for approximately 430,000 hours of demountable partitions work and glaziers for a total of 17,000 hours of work. EX 5. In each year between 2008 and 2015, Colonial had about 20 demountable glass partition jobs per year and called the Glaziers for referrals to its projects for the handling and installing of raw glass. The Glaziers were on these jobs and knew or should have known about the assignments, but did not file grievances against Colonial. Tr. 131.

NEFS' Houle testified that NEFS had both Glaziers-represented employees and Carpenters-represented employees on several of its jobs. Tr. 331. Once again, there were a substantial number of jobs, as NEFS now has about 30 demountable glass partition jobs each year. Tr. 132. The Glaziers were on these jobs and knew or should have known about the assignments, but did not file grievances against NEFS.

Murphy testified about Interstate Office Partitions, a major demountable glass partitions contractor, employing Carpenters for approximately 110,000 hours per year in accordance with the established practice. CX 5. He reviewed a list of Interstate demountable jobs (CX 2), and testified that not once was it reported to him by his stewards that the Glaziers had raised any issues over the demountable glass partitions, even though the stewards were instructed to be vigilant of the Carpenters' jurisdiction. Tr. 429, 460; CX 2. However, on each of those projects, the Carpenters installed all of the frames, panels and tracks, the work that the Glaziers are now claiming in the present disputes. Tr. 429.

East Coast Office Installations ("ECOI"), one of the larger Boston area furniture contractors performed approximately 40 demountable glass partition wall systems jobs in the

past few years, and on all of its projects, ECOI assigned the work to its Carpenters-represented employees, (EX 1; Tr. 253), only calling the Glaziers when it needed employees to handle raw glass. Tr. 253. ECOI had Glaziers-represented employees working on 70% of its demountable glass partition jobs; yet the Glaziers never filed a grievance over the disputed work. Tr. 256, 270.

The only logical conclusion that can be reached is that the Glaziers were aware of and accepted the established practice in the furniture industry, and that this practice was consistent with the agreement reached in 2003 between the Carpenters and Glaziers. Tr. 420-21, 458, 460, 463, 466.

The Glaziers know that there is minimal past practice of installing demountable glass partitions systems that supports their claim to the disputed work, since their signatory contractors do not and cannot perform the disputed work, and since the furniture contractors who do perform the work all utilize Carpenters-represented employees; so they attempt to expand the area practice beyond what was actually performed at the six projects at issue. This attempt must fail for several reasons. First, as testified to by every witness who actually installs demountable glass partition systems, demountable systems are a distinct and separate product from the permanent wall systems about which the Glaziers' contractors testified. Tr. 1070-71, 1074, 1080-81, 1121-24. The demountable systems, unlike the permanent glass wall systems about which the Glaziers contractors presented evidence, are designed and marketed to be easily dismantled and reconfigured without any significant harm to the office or building. Tr. 40, 195, 223, 264, 1071, 1080-81, 1085, 1124; EX 6; PX 26; PX 27; PX 30, p.7. Each of the demountable systems is marketed as a moveable system. EX 6; PX 26, 27 and 30. Second, the demountable system can only be installed by furniture contractors certified by the

manufacturer/supplier, all of whom happen to be the furniture contractors signatory with the Carpenters. Tr. 54-55, 159, 192, 224, 259, 329-30. Third, the Internal Revenue Service treats demountable partition systems as personal property, and not part of the permanent structure of the building, unlike the permanent glass wall systems installed by the Glaziers' contractors, which are treated as real property, and are included in the general contractor's contract for construction of an office or building. Tr. 62, 140, 521, 732, 781; Rev. Rul. 75-178, 1975-1 CB. 9 (the personal property depreciation is dependent on "how permanently the property is designed to remain in place"); see also IRS Cost Segregation Audit Techniques Guide, Ch. 2, supra at Footnote 1.

As much as the Glaziers' witnesses contend that the permanent glass walls their contractors install are the same as demountable partitions systems, that contention is not supported by the record. The Glaziers' witnesses testified about permanent floor to ceiling walls that are part of the building structure. When pressed on the issue of whether the glass wall systems were really not permanent and could be dismantled they responded with statements such as "you could if you wanted to" (Tr. 660) and "anything could be moved." Tr. 1145.[16] There is no record evidence that these glass wall systems are built or designed to be taken down, moved and reconfigured.

Moreover, even if these permanent glass wall systems were to be considered relevant area practice, the Glaziers presented limited evidence of area practice compared to the Carpenters' overwhelming evidence of area practice. The Glaziers' contractor witnesses testified mostly anecdotally, with little hard data in the form of a Boston area job lists or hours worked, in

[16] The original reference to "anything could be moved" was Peciaro's "tongue-in-cheek" comment that if you wanted you could dismantle the federal building and rebuild it in Chicago, but that does make it demountable. Tr. 1123-24. The Glaziers then attempt to use that comment to support their argument that a permanent glass wall system is "demountable."

contrast to the testimony of the furniture contractors and the Carpenters who presented evidence of massive amounts of demountable glass partitions work performed by furniture contractors, with lists of specific job and records of hundreds of thousands of hours worked.

B. Area Practice – Shower Doors

In addition to the large shower door installation projects performed by NEFS with a composite crew, Cheviot Construction, a major shower door contractor, also installs shower doors with a composite crew of carpenters and glaziers. CX 3; Tr. 430-32. What is particularly significant about Cheviot's prior assignments and past practice is that, like NEFS, Cheviot is a contractor who is signatory to a collective bargaining agreement with both the Glaziers and Carpenters. Tr. 431. The Glaziers presented no evidence to counter or impeach Murphy's testimony with respect to Cheviot's practice. It is also significant that none of the Glaziers' contractor witnesses who testified about installing shower doors are signatory to an agreement with the Carpenters. Prior to the summer of 2016, the Glaziers never objected to Cheviot's established practice of assigning shower door work to a composite crew of Carpenters and Glaziers. This leads to the inescapable conclusion that the area practice in the Boston area for a contractor who is signatory to collective bargaining agreements with both the Glaziers and Carpenters, is to assign that work to a composite crew, which may help explain why the Glaziers were so willing to agree to the 50/50 composite assignments on the two Avalon Bay jobs.

Therefore, the factor of area practice favors an award of the disputed work of demountable glass partitions systems to employees represented by the Carpenters, and an award of the disputed shower door work to a 50/50 composite crew of employees represented by the Carpenters and employees represented by the Glaziers.

VII. RELATIVE SKILLS AND TRAINING

There are three areas in which NEFS' and Colonial's Carpenters-represented employees possess the skills and training for installing the demountable glass partition wall systems and shower doors: (1) the formal training received in Carpenters' Training Program; (2) the on-the-job training they receive as full-time installers; and (3) the manufacturers' training and certification.

Similar to the testimony in *Glaziers District Council 16 (Malv, Inc.)*, 356 NLRB, 760, 763, (2011), the installation of demountable partitions installation and shower doors, requires the knowledge and skill of "plumb level and square," the handling of mitered corners, installing doors and hardware and layout. Tr. 142-145, 164-167. All of these skills are the basic skills in which carpenters are trained and that they possess. Tr. 164-167. More significantly, these are the skills that are taught at the New England Carpenters Training Center to all apprentice carpenters. Tr. 505-09. Not only are these skills taught at the Carpenters Training Center, but as part of the required 2000 hour per year, on-the-job training for apprentice carpenters, they are assigned to work for furniture contractors installing demountable partitions. Tr. 163, 503-04.[17]

The second way in which carpenters acquire the skills and training for the disputed work, is their long term employment with employers like Colonial, NEFS and ECOI installing demountable partitions and demountable glass partitions in particular. Colonial has a crew of 60-90 full-time, regular carpenter employees. Tr. 141. NEFS has a crew of 150-250 full-time, regular carpenter employees. Tr. 320. Most of these employees have worked for Colonial and NEFS for 12-15 years and 5 years, respectively. Tr. 141, 320. Through performing this work on a continuing basis, year after year, the carpenter employees have developed skills and experience

[17] It is notable that if and when glazier apprentices work for Colonial, they only handle the raw glass, and do not perform the layout, the installation of the tracking, or the installation of the framed panels. Tr. 83-86, 94, 121.

in the installation of demountable partition systems, to the point where Colonial and NEFS would not even consider assigning the work to anyone but carpenters. Tr. 54, 154. Or as testified to by employer representative, McKenna testified: "Our carpenters are trained." Tr. 54. Twomey of ECOI testified about its carpenters' training: "So they're highly competent that a carpenter can do mostly anything." Tr. 280. Colonial's and NEFS' Glaziers-represented employees do not possess any of this on-the-job training or experience, as they have not performed the work. Tr. 64, 197, 259.

With respect to NEFS' shower door installations, both glaziers and carpenters have an equal amount of experience performing the work for NEFS, since all of its work has been performed with a 50/50 composite crew.

Third, and most significant, the Carpenters-represented employees are the only employees who have received the manufacturers' training and certifications. For warranty purposes, the manufacturers of the demountable partitions systems require that the installation contractor have key employees certified by the manufacturer for the installation of the work. Tr. 55, 65, 192, 329. As Colonial's Gene Kosman testified, Colonial's decision to send people to training is really driven by the requirements from our clients. Tr. 192. Infinium requires that NEFS' employees be certified in order for NEFS to be allowed to install its product. Tr. 329. The manufacturers' training and certification takes place at the manufacturer's place of business and on the jobsites. All of Colonial's and NEFS' key employees have been trained by the manufacturers of the systems that those contractors install. Tr. 168, 224. All of Colonial's key employees are carpenters. Tr. 55. Colonial estimates that 16 to 24 of its demountable system carpenters have been trained and certified by various manufacturers. Tr. 65. The manufacturers' training helps Colonial secure contracts for work. Tr. 65. Infinium representatives came to

NEFS jobsites to train the 6-10 carpenters it employs to install Infinium's demountable system. Tr. 303-04. The only Colonial and NEFS employees who have received the manufactures' training and certification are carpenters. Tr. 55, 303-04.[18] The trained and certified carpenters then train their co-employees on the installation of the manufacturers' systems. All of the employees who have received this secondary training are also carpenters. Tr. 55.

The present day reality is such that if Colonial and NEFS were required by the Board to reassign the installation of any of the demountable partitions systems to employees represented by the Glaziers, they would be unable to do so, since there is not one Colonial or NEFS Glaziers-represented employee who has received the manufacturers' training and certification, that would allow him or her to install the systems. Tr. 55, 64-65, 303-04. Where Colonial and NEFS do not have liberty to choose the product being installed, and where the product is selected and purchased by the owners from the manufacturers/suppliers, who then contract with Colonial and NEFS, a Board order requiring Colonial and NEFS to assign the work to employees represented by the Glaziers could not be implemented, since there are no manufacturers' certified glaziers.[19] It would mean that Colonial and NEFS could not perform the work. The Board 10(k) process was established to peacefully resolve jurisdictional disputes and not to disrupt an entire industry, by making it impossible for an employer to work in the industry.

Therefore, the factor of relative skills and training favors the assignment of the work to employees represented by the Carpenters.

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[18] Many of the trained carpenters are carpenter foremen, but they are all working foremen. Tr. 207-08.

[19] The Glaziers' apparent argument is that the Glaziers-represented employees could be trained and certified by the manufacturer. That argument is not persuasive. The Board's determination must be based on whether the employees have the necessary skills and training "now;" not whether they are capable of being trained and acquiring those skills in the future.

IX. ECONOMIES AND EFFICIENCIES OF OPERATION

Both NEFS and Colonial perform considerably more work than just the installation of demountable partitions and shower doors. The other work performed by the Employers requires the employment of a substantial number of carpenters, resulting in Colonial employing approximately 60-90 carpenters on a full-time basis and NEFS employing approximately 160-250 carpenters on a full-time basis Tr. 141, 320; CX 5. As a result of having this many carpenters in their employ at all time, both Colonial and NEFS are able to move carpenters from one task to another when work slows downs in a particular area. That allows Colonial to move its carpenter employees back and forth between demountable partition work and other furniture and cubicle installation work and vice versa. Tr. 58, 134, 198, 209. Similarly, it allows NEFS to move its carpenter employees back and forth between demountable partition work and shower door installation and metal stud and drywall work and window treatment work and other interior systems work. Tr. 240, 323. Other than for the handling and installing of raw glass, neither Colonial, nor NEFS employ glaziers, and neither employer has any regularly employed glaziers. Tr. 65, 134, 154, 303-04, 321. Colonial's and NEFS' glazier employees cannot provide this flexibility in staffing. This frequently results in it being inefficient even to use glaziers for the installation of raw glass when it constitutes less than a day's work. Tr. 134.[20]

Another aspect of efficiency that favors the assignment of the disputed work to Carpenters-represented employees is the efficiency that comes with Colonial's carpenter employees' years of experience and "familiarity with the company" and "familiarity with the product lines. Tr. 153-54. Colonial has 60-90 regular carpenter employees, with 45-50 of those employees having been with Colonial 12-15 years. Tr. 141. That institutional experience

[20] Even when the installation of glass constitutes a full day's work, it is difficult to hire glaziers to work just for one day when there is no other work available for them. They sometimes decline the work. Tr. 55-56.

translates into production efficiencies, especially compared to the glaziers who are not regular employees. Tr. 141, 303-04. Finally, there are the administrative and paperwork inefficiencies from hiring glaziers on referrals for short-term jobs when there are already carpenters on the payroll. Tr. 56, 306.

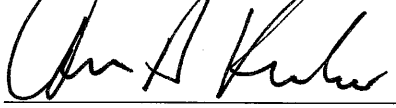
In addition to Colonial and NEFS not having the same flexibility with their glazier employees as they do with carpenter employees, the record evidence indicates that due to the Carpenters' training and experience, the Carpenters-represented employees are more productive in performing the disputed work. Tr. 154, 244, 296-97.

Therefore the factor of economy and efficiency of operation favors the awarding of the disputed work to employees represented by the Carpenters.

X. CONCLUSION

After considering all the relative factors, the Board should conclude that employees represented by the Carpenters are entitled to continue performing the work in dispute, as assigned by the Employer.

New England Regional Council of Carpenters,
Local 33, by their attorney



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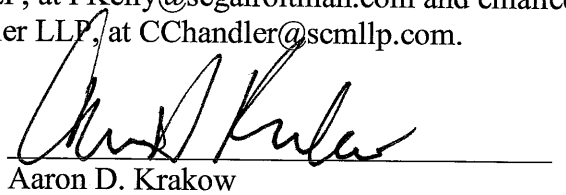
CERTIFICATE OF SERVICE

I, Aaron D. Krakow, hereby certify that I caused a copy of the foregoing to be emailed this day to Paul F. Kelly, Segal Roitman, LLP, at PKelly@segalroitman.com and emailed to Carol Chandler, Stoneman, Chandler & Miller LLP, at CChandler@scmllp.com.



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